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AUTHORITIES

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IN THE

SUPREME COURT OF THE UNITED STATES

..... Term, 1947.

No. .....

NEWTON OIL COMPANY, a corporation, APPELLANT,

vs.

JOHN BOCKHOLD and EARLE F. WINGREN, APPELLEES.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

The appellant respectfully presents this, its brief, pursuant to Rule 7, Subheading 3, opposing the motion of the appellees to dismiss.

INTRODUCTION.

The motion to dismiss filed by appellees is denominated "Motion to Dismiss for Want of Jurisdiction" and is divided into two parts, part I being subdivided into five paragraphs and part II being divided into four paragraphs.

The statement by appellees in opposition to appellants jurisdictional statement and in support of motion to dismiss discusses the contentions of the appellees in the same order and under the same headings stated in the motion to dismiss.

The appellant will follow the same order and answer each contention and meet each ground urged under the same headings designated by the appellees.

In this brief the parties will be referred to as follows: The appellant, who was the defendant in the Trial Court of the District Court of the City and County of Denver, State of Colorado, as Newton; the appellee, Bockhold, who was the plaintiff in the Trial Court, as Bockhold; and Wingren, who was the third party defendant in the Trial Court, as Wingren. All references to the record are to the record as submitted by the Clerk of the Supreme Court of the State of Colorado with this appeal.

STATEMENT OF FACTS.

The appellees in their motion to dismiss and their statement in support thereof have failed to present to this court a statement of facts which the appellant feels is necessary, and certainly would be helpful to assist this court in reaching a conclusion as to whether or not its jurisdiction has been properly invoked.

Bockhold was, with other persons, the owner of certain oil and gas leases on United States Government land and also on fee land in Rio Blanco County, Colorado in what is now known as the Rangely Oil Field. He had endeavored for some years to develop these leases and had drilled thereon some ten shallow wells; none of which was sufficiently productive to produce income in an amount which would pay rentals and expenses. Bockhold had considerable unpaid rental due to the United States Government and had incurred in addition thereto many debts and obligations which were pressing.

In August of 1942 Bockhold and his associates entered into a Transfer Assignment with Newton under which this acreage was assigned to Newton and Newton undertook to pay Bockhold's debts, the past due rental upon the acreage and Bockhold and his associates $250,000 out of a percentage of the oil and gas produced, saved and marketed from the property assigned. There were certain option privileges reserved to Newton, all of which were exercised and are not involved.

Shortly thereafter Bockhold entered into an Employment Agreement with Newton, which referred to the sale and transfer by Bockhold of the leases and stated that the Employment Agreement was entered into "in order to effectively and successfully carry out the terms of said agreement and operate the properties therein referred to profitably, it is deemed advisable that Bockhold continued to render services, assistance and aid to the company in the management and operations of said properties, and to cooperate with acts and advice;" (Folio 34).

Bockhold's obligations under this agreement are stated in Paragraph I thereof, as follows:

> "Bockhold will assist the company in all ways possible to operate and develop the properties referred to in the agreement and transfer between Bockhold and the company herein above referred to, and will render such services from time to time as the company shall request and require, and give such advice, opinions and information as he shall be called upon to give, which information is within the knowledge of the said Bockhold, and will in all manner cooperate and assist the company not only in the operation and development of the properties covered by the said agreement above referred to, but also in the acquisition and development of other properties in the same general area." (Folio 35.)

After the execution of these contracts Newton paid Bockhold various sums of money from time to time; paid Bockhold's debts; paid the past due rentals upon said property and took over the operation thereof and proceeded with the development of said properties. Thereafter Bockhold went into the Rangely Field and secured an oil and gas lease upon property right in the heart of the property he had previously assigned, and which lease Newton contended Bockhold had discussed and promised to secure for Newton and was one of the leases contemplated in the Employment Agreement.

Upon discovery by Newton that Bockhold had secured this lease, Newton demanded its assignment, whereupon

Bockhold assigned a one-fourth interest therein to his attorney, Wingren, who had full notice of Newton's claim and demand prior to taking said assignment. Before Newton could take any action to enforce its contract Bockhold instituted a suit in the District Court to have the Employment Contract cancelled and held for naught, and each of the parties released therefrom, for costs and general equitable relief, "on the ground that said Employment Contract was entered into without consideration, is void for lack of mutuality, is contrary to public policy and is impossible of performance."

Newton filed his answer to this complaint in three distinct parts:

1. Newton denied all of the allegations of the complaint;

2. Newton affirmatively pleaded the defense of estoppel;

3. Newton affirmatively pleaded the defense of laches.

Newton attached to its answer a counterclaim in which it sought to have its contract specifically enforced and equitable relief, requiring Bockhold and Wingren to assign the lease obtained by Bockhold.

To the counterclaim Bockhold filed a general denial and Wingren filed his defense that he took his assignment as an innocent purchaser for value without notice. With the issues thus formed the case proceeded to trial.

At the close of Bockhold's case in chief Newton moved the Trial Court for an order dismissing said complaint as of non-suit. This motion was granted by the Trial Court and Bockhold's complaint dismissed as of non-suit. The Trial Court then specifically ordered Newton to present no evidence in support of its answer and in support of its affirmative defenses of "estoppel" and "laches". The court stated and found that the Employment Contract was a good, valid and subsisting contract and ordered Newton to proceed with its evidence on its counterclaim. After the evidence on the counterclaim was presented the Trial Court found the issues on the counterclaim in favor of Bockhold

and Wingren. All parties feeling aggrieved by the conclusions of the Trial Court the matter was taken to the Supreme Court of the State of Colorado.

The Supreme Court of the State of Colorado reversed the Trial Court in its action dismissing Bockhold's complaint, and affirmed the Trial Court in its action finding for Bockhold and Wingren on the counterclaim, and ordered judgment entered in favor of Bockhold and against Newton on Bockhold's complaint.

Newton then filed a Petition for Rehearing, and pointed out that the action of the Supreme Court in ordering judgment entered against Newton and in favor of Bockhold without permitting Newton the opportunity to present its evidence in support of its defenses, was depriving Newton of due process of law in violation of the Constitution of the United States and the State of Colorado. This motion for rehearing was denied, and Newton proceeded to take the preliminary steps for a review by this court through an appeal from the Supreme Court of the State of Colorado.

Newton then filed with the Supreme Court of the State of Colorado a "Renewed Petition for Rehearing", again calling the attention of the Supreme Court of the State of Colorado to the fact that, by its judgment it was depriving Newton of due process of law as guaranteed by the United States Constitution. This Renewed Petition for Rehearing was granted by the Supreme Court of the State of Colorado. Whereupon Newton took no further steps with reference to the appeal proceedings to this Court which it had started.

On rehearing the Supreme Court of the State of Colorado again announced its opinion, which is attached to the record herein; changed the wording of its former opinion, eliminated certain portions thereof, but again reversed the Trial Court in its order dismissing Bockhold's complaint, and again ordered judgment entered for Bockhold and against Newton, without affording Newton the opportunity to be heard upon its answer and defenses of "estoppel" and "laches."

Newton then again filed a Petition for Rehearing, again calling the attention of the Supreme Court of the State of

Colorado to the fact, that by its order and decision directing judgment to be entered for Bockhold and against Newton, on Bockhold's complaint, without permitting Newton the opportunity to be heard, it was denying to Newton due process, as guaranteed by the Constitution. This Petition for Rehearing was denied. Thereupon Newton proceeded with the present appeal.

PART I—PARAGRAPHS 1 AND 2.

Under this heading Bockhold and Wingren (the appellees) close their reference with the following statement: "We shall pass without comment Paragraphs 1 and 2 of the motion." Newton, however, respectfully calls the attention of the court to the fact that under Title 28, Section 344 of the Judicial Code this court is expressly given the right and power to consider the application either as an appeal or as a petition for certiorari and under section (b) is the following: "or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

Newton claims that it was denied due process of law, a right and privilege guaranteed it under Amendment XIV of the Constitution of the United States.

PART I—PARAGRAPH 3.

MOTION TO DISMISS.

Under this heading Bockhold and Wingren start out with the statement "The case below was as follows" but they only quote a portion of the Supreme Court's first opinion and then a portion of the Supreme Court's second opinion and proceed with a statement of certain conclusions which they reach as to the reasoning of the Supreme Court of the State of Colorado in its final opinion. The full opinion of the Supreme Court of the State of Colorado is attached to the record transmitted by the Clerk of the Supreme

Court of the State of Colorado to this Court. A full reading of this opinion will disclose:

(1) That the Supreme Court of the State of Colorado finds, without any evidence presented by Newton, that the Agreement is ambiguous;

(2) That it, the Supreme Court of the State of Colorado, cannot understand what is meant by the Employment Agreement;

(3) That in all probability, even if Newton were permitted to offer evidence, the evidence would not be different from that already before the court;

(4) That the rule contended for by Newton, to-wit: That since the Trial Court sustained its motion for a nonsuit, then in the event the Supreme Court does not affirm such action of the Trial Court, it must permit Newton to introduce proof before making an adverse determination of the issue. "Such is undoubtedly the rule."

The reference last herein made to the final decision of the Supreme Court of the State of Colorado conclusively demonstrates the fact that said court recognized the rule and they refused to follow it; by its own statement, "Such is undoubtedly the rule" the Supreme Court of the State of Colorado recognized that the right to be heard upon Newton's defenses being the rule, its failure to grant such right was a violation of that rule and clearly denied to Newton due process of law. The Supreme Court of the State of Colorado saw the light but refused to follow it and attempted to justify its refusal by entering the realm of conjecture and the psychic. It states that the only evidence which Newton could offer in support of its defense, it was obligated to offer in support of its counterclaim. This is not the fact and was not the fact. The Trial Court found the contract to be a good, valid and subsisting contract. With this finding the validity of the contract was already established and no evidence was offered by Newton, nor was any required to be offered by Newton in support of the validity of the contract. The only evidence offered by Newton on its counterclaim was the evidence that Bockhold had taken the lease in his own name, after he had entered into his contract; that

he had accepted money from Newton; that he had represented he was an employee of Newton's in securing gasoline rations; that Wingren knew of Newton's claim and of the existence of the contract when he took the assignment of a portion thereof from Bockhold, and was not an innocent holder for value; and set forth the location of the property with reference to the property covered by the sale agreement.

Newton does rely upon the case of *Saunders vs. Shaw and The Board of Drainage Commissioners,* 244 U.S. 317, which case is practically identical with the case at bar, arose in exactly the same manner as the case at bar and in that case, as in the instant case, the Supreme Court of the State reversed the Trial Court and rendered "judgment absolute against the party who succeeded in the Trial Court, upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had therefore no occasion and no proper opportunity to introduce his evidence."

In the above case this court stated that that conduct was a violation of due process of law.

Likewise in that case the constitutional or Federal question was raised after Petition for Rehearing was denied and this court in that case stated at page 320:

> "The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation.

> Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice by his assignment of errors. We do not see what more he could have done."

The *Saunders-Shaw* case has never been reversed by this court nor distinguished. Its findings and conclusion has been followed by other courts and its reasoning approved. See *Evans v. Industrial Accident Commission* (Cal.) 162 P. 2d 488 at page 491; see also *Jacobsen v. Jacobsen*, 126 F. 2d 13.

That there is a Federal question involved necessarily follows when the final decision of the Supreme Court of the State of Colorado denied Newton his day in court, the right to be heard and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

What constitutes due process of law has been the subject of numberless decisions of this court and other courts. The definition most generally accepted, and usually approved is Daniel Webster's definition in the Dartmouth College case, *4 Wheat (U.S.)* 518, 4 L. ed. 629, as follows. "A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

> "Whether a Federal question is adequately presented and decided in the State Court is in itself a Federal question." *Alma Lovell v. City of Griffin, 303 U.S. 444; 82 L. ed. 949.*

It has been urged by the appellees that the appellant should have anticipated the final action of the Supreme Court. Action by the Supreme Court contrary to the admitted rule, certainly need not be anticipated. What could have been anticipated, and what was in fact anticipated is that the court would follow the rule. Under American Jurisprudence, due process requires a day in court for a defendant (appellant); a right to be heard; an opportunity to present its evidence and defenses, before an Appellate Court which has not heard the evidence nor observed the demeanor

of the witnesses on the stand, presumes to reverse the judgment of a Trial Court, which did hear the evidence and did observe the demeanor of witnesses upon the stand, as of nonsuit at the close of appellee's case in chief and then enters a judgment in favor of plaintiff (appellee Bockhold) against the defendant (appellant Newton) as was done by the Supreme Court of the State of Colorado.

This court has stated on many occasions, that due process requires the opportunity to be heard and present all evidence and argument in support of one's defenses at some stage of the proceedings before a judgment is final. There have been many cases in which this proposition has been urged, and while this court has, as a general rule, refrained from stating the procedure necessary to be followed by State Courts, or fixing the exact time when the opportunity to be heard must be afforded litigants, this court has consistently held that at some point prior to the time that a judgment becomes final, such an opportunity must be afforded a litigant. *Consolidated Edison Company vs. National Labor Relations Board,* 305 U.S. 197, 83 L. ed. 126; *George Moore Ice Cream Company, Inc. vs. J. T. Rose, Collector of Internal Revenue,* 289 U.S. 383, 77 L. ed. 1265; *William H. Griffin vs. Grace H. Griffin,* decided February 25, 1946 and reported 90 Law. ed. Advance Opinions No. 9 at page 534; 12 *American Jurisprudence,* Section 608, page 303 "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step to be taken. There is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute."

And again in *12 American Jurisprudence,* at page 305, Section 609, is the statement, "Even if he has no defense to the action, the fundamental law of the land secures to him the right to be heard in his defense."

PART I—PARAGRAPH 4.

DEFENSE OF ESTOPPEL.

Under this heading Bockhold and Wingren admit that the Supreme Court made no reference to Newton's fourth defense "estoppel" and they state: "Estoppel does not lie as against invalid contracts." However, under the case cited by Bockhold and Wingren and quoted from there is the statement at the bottom of page 5 of Bockhold's and Wingren's statement as follows: "However it has been held that a part to an invalid contract, which is not illegal and unlawful may be equitably estopped to dispute the validity of the contract." Neither the Trial Court nor the Supreme Court of the State of Colorado ever found, nor could either court find that this Employment Contract was either illegal or unlawful. The most the Supreme Court found was that it was ambiguous and that it could not understand the contract and that if the minds of the parties met the Supreme Court could not find that they did meet from the terms of the contract.

ESTOPPEL IS A GOOD DEFENSE UNDER THE DECISIONS OF THE STATE OF COLORADO.

The defense of estoppel to an equitable action to rescind and cancel a written contract, if supported by the evidence, is a sufficient defense. The defense of estoppel has been recognized in the State of Colorado in many decisions. *Lillyland Canal vs. Wood,* 56 Colo. 130, 136 Pac. 1026, in re *Schofield's Estate,* 101 Colo. 443; 73 Pac. 2nd 138.

Estoppel generally is recognized as a good defense to an action to cancel or rescind a contract. *19 American Jurisprudence,* page 800. "A person may be estopped, however, from questioning the existence or effect of a contract, the existence of which he has asserted to the other party to his own benefit or the injury of the other. If a party appears to be acting under a contract and leads the other party to believe that he is doing so, he may be estopped from subsequently denying it."

Estoppel as a defense was recognized by the Supreme Court of the United States recently in the case of *D'Oench,*

Duhme & Co. vs. Federal Deposit Insurance Corporation, 315 U.S. 447, 86 L. ed. 956.

The defense of laches, which was specially pleaded by Newton, is a good defense to an action to cancel and rescind a contract. However, the opinion of the Supreme Court of the State of Colorado and the judgment entered thereon against Newton and in favor of Bockhold without permitting Newton the opportunity to present its evidence in support of the defense of laches, clearly deprived Newton of due process and the opportunity to be heard. The defense of laches has been recognized in Colorado as a good defense, in the case of *Heald vs. Western Refineries,* 146 P. 2d 221, 112 Colo. 100. Numerous other cases could be cited to the same effect and the text authorities are agreed upon said general proposition.

The Validity of a Contract is a Matter of State Jurisdiction.

Newton concedes that the validity of a contract is a matter of State jurisdiction but respectfully contends that that State jurisdiction must be such as conforms to the established rules of that state, and likewise does not offend against the Constitutional guaranty of due process under the Fourteenth Amendment of the United States Constitution. It is not in the jurisprudence of the State of Colorado to enter a judgment without affording a person the right to be heard upon valid legal defenses, that it is in the jurisdiction of the State of Colorado not to so do is recognized by the final opinion of the Supreme Court of the State of Colorado in the instant case where it says: *"Defendant insists that since the trial court sustained its motion for a nonsuit, then, in the event we do not affirm such action of the trial court, we must permit defendant to introduce proof before making an adverse determination of the issue. Such is undoubtedly the rule."*

A FEDERAL QUESTION WAS PRESENTED TO THE STATE COURT FOR DECISION.

Newton presented the Federal question of denial of due process to the State Supreme Court on three separate occasions. First on its original Petition for Rehearing; second on its Renewed Petition for Rehearing and third upon its final Petition for Rehearing after the Supreme Court of the State of Colorado had announced its second opinion.

Newton presented this Federal question at the earliest opportunity after the Supreme Court of the State of Colorado first announced its decision in which it ordered judgment entered in favor of Bockhold and against Newton without affording Newton the opportunity to be heard; and Newton persisted in its presentation of this Federal question. At every opportunity it followed and fully and completely conformed to the decision of this court in the *Saunders vs. Shaw* and *The Board of Drainage Commissioners* case, *infra.*

THE APPEAL.

Under the above heading Bockhold and Wingren contend that the Federal question was not raised until Newton first filed its Petition for Rehearing, and that Newton should have anticipated that the Supreme Court might reverse the trial court and enter judgment in favor of Bockhold and against Newton. Newton certainly might have anticipated that the Supreme Court would reverse the trial court, which had granted Newton's motion to dismiss as of non-suit, but Newton certainly could not anticipate and did not anticipate that the Supreme Court would enter judgment for Bockhold and against Newton without affording Newton the opportunity to present its evidence in support of its defenses, in accordance with the established rule in Colorado and throughout the United States, a rule which the Supreme Court in its final opinion states "Such is undoubtedly the rule".

Bockhold's and Wingren's efforts to reason that Newton's position would not have been changed by an affirmance

of the action of the Trial Court is ingenious, but does not answer Newton's contention that it was entitled to be heard upon its defenses of estoppel and laches, nor does it answer the recognized rule followed in Colorado and by the Supreme Court of the United States, and in practically all other jurisdictions within the United States, that estoppel and laches are good defenses to an action to rescind or cancel a contract, which contract is not unlawful or illegal.

PART II.

Under Part II Bockhold and Wingren open the discussion with the statement: "Although we do not accentuate the point, we are constrained nevertheless to call the court's attention to the fact that this is the second attempted appeal in this cause and represents, we submit, an extraordinary misuse of appellate processes."

When Bockhold and Wingren state that they "do not accentuate the point" it is assumed that they recognize that the jurisdiction of the Supreme Court of the United States is not to be invoked until all efforts at securing relief from the Supreme Court of the State of Colorado have been exhausted.

What Newton sought from the Supreme Court of the State of Colorado in its first Petition for Rehearing, and in its Renewed Petition for Rehearing, was the recognition of and the application of the rule requiring that Newton be given the opportunity to present its evidence in support of affirmative defenses of estoppel and laches before judgment was entered against it.

Newton thought that when the Supreme Court of the State of Colorado denied its first Petition for Rehearing, that the only relief and only redress which it could have was an appeal to the Supreme Court of the United States, and with this in mind it instituted the appellate proceedings. However, when the Supreme Court of the State of Colorado granted Newton's renewed motion for rehearing, said court again held out the hope to Newton that it would, at the hands of that court, have its day in court, and be afforded

due process by being given the opportunity of presenting its evidence in support of its defenses of estoppel and laches.

Newton hoped and had the right then to expect that the Supreme Court of the State of Colorado would apply that principle of jurisprudence which, by its final opinion, it recognized to be the general rule, "to permit defendant to introduce proof before making an adverse determination of the issue."

With the proceedings in this state it would have been improper for Newton to have proceeded in the Supreme Court of the United States with its appeal. The Supreme Court of the State of Colorado by granting a rehearing had conclusively ruled that its former decision was not final, and that said decision was not its last word; and until the Supreme Court of the State of Colorado had announced its second opinion and entered its second judgment and thereafter denied Newton's Petition for Rehearing, there was no binding final judgment from which Newton could appeal to the Supreme Court of the United States.

The argument of Bockhold and Wingren that Newton has toyed with the processes of the Supreme Court of the State of Colorado and the Supreme Court of the United States, *is dispelled by the admission that the Supreme Court of the State of Colorado, upon Newton's Renewed Petition for Rehearing did grant such rehearing and thereafter did render a new opinion which superseded its previous opinion.* There was no abandonment; on the contrary there was a conscientious and persistent insistence upon the right of Newton to have its day in court, and to be heard upon its defenses before judgment was entered against it, after it had successfully urged its motion for non-suit and to dismiss in the Trial Court.

CONCLUSION.

It is respectfully submitted that this court should assume jurisdiction of this case and deny the motion to dismiss so that the appellant might at least, at the hands of this court, be afforded that due process which was denied by the Supreme Court of the State of Colorado and so that

some time and at some place the appellant will have its day in court, and be afforded the opportunity of presenting its defenses to the complaint.

Respectfully submitted,

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